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In The

Supreme Court of the United States

KLAMATH TRIBES OF OREGON; JOSEPH HOBBS; ROBERT ANDERSON; JOSEPH KIRK; ORIN KIRK; LEONARD NORRIS JR.; PHILLIP TUPPER; ROBERT BOJORCAS; KLAMATH CLAIMS COMMITTEE: CATHERINE WEISER-GONZALEZ; MILLER ANDERSON,

Petitioners,

v.

PACIFICORP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL H. ISRAEL
1315 Bear Mountain Drive
Boulder, Colo 80305
303-246-9027

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Court on multiple occasions has ordered equitable relief, based upon an implied right of action, to preserve the exercise of Northwest Indian treaty fishing at hundreds of off reservation "usual and accustomed stations." Should a right of action at law for damages against a private dam builder be recognized as the preferred remedy for the one Northwest treaty which (a) forbids treaty Indians from leaving their reservation to protect their exclusively on reservation fishing right from downstream interference and (b) granted control over the only means of salmon passage to non Indian pioneers?

LIST OF PARTIES

Plaintiffs-Appellants are the Klamath Tribes of Oregon, a federally recognized Indian tribe, the Klamath Claims Commission, a federally sanctioned tribal entity and Tribal members Joseph Hobbs; Robert Anderson; Joseph Kirk; Orin Kirk; Leonard Norris Jr.; Phillip Tupper; Robert Bojorcas; Catherine Weiser-Gonzalez; and Miller Anderson.

Defendant-Respondent is PacifiCorp, an Oregon corporation doing business in Oregon and California and other states.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Klamath Tribes *et al.* is a federally recognized Indian tribe, has no parent and there are no publicly held companies that hold any stock of the petitioners.

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PETITION

The Klamath Tribe, the Klamath Claims Commission and individual tribal members respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Oregon is reproduced in Appendix C. The unreported opinion of the United States Court of Appeals for the Ninth Circuit is reported at Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATUTORY AND TREATY PROVISIONS

1954 Klamath Termination Act, 25 USC 564 *et seq.*

1986 Klamath Restoration Act, 25 USC 566 *et seq.*

The Treaty of October 14, 1864, 16 stat. 707.

STATEMENT OF THE CASE

A. Introduction

Consistent with the Supreme Court Rule 10(c), the Klamath Tribes *et al.* demonstrate that their petition should be granted, for the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Moreover, its ruling does not constitute the misapplication of a properly stated rule of law.

The Ninth Circuit's one sentence ruling ignores the Court's well documented analysis for determining when a right of action for damages may be implied where "rights creating" federal directives are violated by "deliberate indifference," resulting in "less favorable treatment." *Jackson v. Birmingham Bd. of Ed.*, 544 US 167, 174 (2005). Here, the federal enactment is the Treaty of October 14, 1864, 16 stat. 707, ratified July 2, 1866. By its express terms, non Indian pioneers were to occupy the southern 90% of the Klamaths' historic domain. The Indians were to vacate their historic roaming and fishing and remain within the northern 10% of their territory. In exchange, the Klamaths' undisputed reliance on salmon fishing was "preserved." The Indians and pioneers each understood that the promise that Klamath fishing would be "preserved" required continuing passage of salmon in the Klamath drainage.

This Petition asks the Court to confirm an implied right of action for damages as it relates to the

successor of the entity which knowingly and deliberately elected to block salmon passage and generate electricity for the growing pioneers. That private entity knew that its profits would far exceed the damages incurred by the Klamaths. Beginning in 1916, the company constructed the first of several dams on the Klamath River – the sole passage way for Klamath treaty salmon. No consent of the Klamaths or of the United States was secured. To the contrary, the dam builder represented it would keep salmon coming and/or "assume liability" to keep the Klamath Indians whole.

The 1864 treaty "bargain" is spelled out unambiguously in Art. 1 of the 1864 treaty. The Indians were required to cede to the United States and non Indian pioneers millions of acres of down river terrain and move north to the headwaters of the Klamath River and remain there with the express commitment that "the exclusive right to fish in the rivers arising within the reservation would **be secured**." In exchange, non Indians were to permit passage of salmon in the Klamath River. In the absence of such a commitment the federal rights granted the Indians would disappear and the 1864 agreement would in the words of the Court result in an "impotent outcome." *United States v. Winans*, 198 US 371, 380 (1905). This federal treaty right has been noted by the Court, when subsequently it acknowledged that salmon fishing was then essential to the ability of the Klamath Indians to sustain themselves on their

reduced reservation. *Klamath Tribes v. Oregon Department of Fish*, 473 US 753, 761 (1984).

Equitable relief enjoining the construction of a barrier to salmon passage downstream was not realistic. By the express terms of the 1864 treaty, the Klamaths could not, under threat of federal law, leave their reservation. Arguably any attempt to seek equitable relief would have been resisted on the basis that unlawfully leaving the reservation to police salmon passage downstream would constitute a violation of the equitable maxim that "he who comes into equity must come with clean hands." *Precision Co. v. Automotive Co.*, 324 US 806, 814 (1944). The Indians' only practical form of relief could be the calculation of damages at law – measured once they saw their reservation salmon runs disappear. No ruling of this Court supports the one sentence conclusion of the Ninth Circuit, below, which operates to permit only pre-dam construction injunctive relief as the sole remedy to protect explicitly guaranteed on reservation fishing rights.

As the Klamaths next show, the Court's multiple holdings that once a federal law contains "rights creating language" and there exists no parallel enforcement scheme to protect such rights, damages are the appropriate remedy in the face of evidence of "deliberate indifference", unless they prove inadequate, *Franklin v. Gwinnett County Public Schools*, 503 US 60, 76 (1992).

B. The Present Litigation

In May of 2004, the petitioners filed an action seeking significant historic damages against PacifiCorp as the successor in interest of Copco, the builder in the period 1913-1917 of Copco No. 1 – a dam placed in the bed of the Klamath River just south of the California-Oregon line. The dam is located within the Klamath River drainage which was ceded to the United States and pioneers in 1864. It is undisputed that construction of the dam eliminated the once significant and economically important salmon fishery secured by the Treaty of 1864. As anadromous fish, salmon breed in the upstream reaches of the Klamath River – an area expressly reserved for the sole and exclusive use of the Klamath Indians in their 1864 Treaty. With the construction of Copco No. 1, salmon could no longer pass upstream to the Klamath Reservation and downstream to the Pacific Ocean.

The Klamath Indians further claim that no federal and state statute of limitations prevents the prosecution of their damage action. Finally, the petitioners claim that post treaty developments in the Upper Klamath River, including large irrigation depletions and the changing land ownership, through acts of Congress, may affect the quantity of damages but do not eliminate a cause of action for damages. *See* first amended complaint. KER, pp. 37-38; PCER, pp. 4-12.[1]

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[1] References to PCER are to the PacifiCorps' Excerpts of Record before the Ninth Circuit and KER are to the Klamaths'

(Continued on following page)

On April 14, 2005, Magistrate Cooney of the United States District Court for the District of Oregon entered recommendations finding that the 1954 Klamath Termination Act, 25 USC 564 *et seq.* had made applicable Oregon statutes of limitations to the Klamaths' claims and dismissed the amended complaint on the basis that it was time barred. Upon review, United States District Court Judge Ann Aiken, *sua sponte*, ruled on July 14, 2005 that the Ninth Circuit intervening *en banc* decision in *Skokomish Tribe v. United States,* 410 F.3d 506 (9th Cir.) (en banc) (2005) foreclosed the Klamaths' cause of action. Appendix C.

Skokomish Tribe held that while an equitable claim may be pursued to preserve off reservation treaty fishing, there existed on the face of the 1855 treaty before it no basis for implying damages which might arise from the inundation of one of many off reservation usual and accustomed fishing stations reserved by the Indians for treaty fishing. A timely notice of appeal was filed on October 11, 2005 after the District Court denied a motion filed by the Klamaths under Rule 59(e) to set aside the July order. Appendix B. On February 28, 2008, the Court of Appeals for the Ninth Circuit held in one sentence that its prior holding in *Skokomish Tribe* foreclosed the claim of the Klamaths. Appendix A.

Excerpts of Record before the Ninth Circuit. In addition each party submitted Addendum to their respective briefs, cited here as PC ADD and K ADD.

REASONS FOR GRANTING THE PETITION

A. The Court's past recognition of equitable rights of action against third parties to preserve the federal right to fish in off reservation "usual and accustomed grounds and stations in common with all citizens of the United States" sets the stage for this on Reservation treaty damage action against third parties.

The Ninth Circuit read the Court's past equitable relief decisions – protecting Northwest treaty rights which assured Indians that they could continue to roam and fish at all of their usual and accustomed stations – as foreclosing damages in the setting of a different federal treaty which barred off reservation roaming and fishing and required the Klamaths to fish exclusively on reservation. In our view, the prior Treaty protection cases of this Court are not a bar here.[2] Rather they establish the presence of an implied right of action to protect Treaty fishing rights. Given the unique nature of the Klamaths' Treaty, the Court's long acknowledged right of action to enforce off reservation fishing rights should be recognized here as embracing an award of damages.

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[2] See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658 (1979); *Puyallup Tribe v. Department of Game of Washington*, 391 US 392 (1968); *United States v. Winans*, 198 US 371 (1905); *Seufert Bros. Co. v. United States*, 249 US 194 (1918).

The Court's past cases uniformly uphold equitable remedies associated with such off Reservation treaties – focusing primarily on the obligations of the states to regulate non Indian fishing so as to fully preserve the Indians' fishing opportunity and early on confirming a land servitude on private lands to allow subsequent generations of Indians to retain physical land access to the retained fishing stations.

In *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 US 658, 666, n.9, the Court acknowledged that the ancient right of roaming would be preserved and quoted from Governor Stevens who developed the treaty bargain for Northwest Indians, on behalf of the United States: "We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries." In the District Court litigation leading up to *Fishing Vessel,* the court reiterated the broad and ubiquitous range of reserved "usual and accustomed fishing stations" for a large number of tribes including:

> the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets. Customary use patterns varied according to the types of water areas, with freshwater fisheries being controlled by the

> residents while the deeper saltwater areas were open to anyone who traveled thereon. Their fishing techniques included trolling, stream weirs, spearing and tidal traps. These Indians continued to fish these areas following their relocation on the Squaxin Island Reservation and to rely in part on fishing for subsistence and monetary income. Salmon fishing and the fishing areas used by their predecessor bands continue to be important to members of the Squaxin Tribe.

United States v. Washington, 384 F. Supp. 312, 378 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975).

These court findings flow of course from the plain language of the identical Stevens off reservation Northwest treaties. For example the 1855 Treaty, permitting the Skokomish Indians to continue to roam and fish as they had since time immemorial, expressly protected this right to roam, Art. IV; made it explicit that the small reservation to which they were directed were not permanent, Art. VII, and required the treaty Indians to travel to a central off reservation location where the United States would provide educational, medical and other treaty promised services. Art. XI. PC ADD, pp. 3-5. Each of these provisions confirm that while Indian title to large portions of water and land were ceded, the Northwest Indians retained significant access and control rights throughout their extensive aboriginal domain.

These now familiar to the Court treaty provisions set forth duties and rights which as noted above are fundamentally different from the duties and rights

established in the Klamaths' treaty of 1864. Because the federal rights established at Klamath are different, the character of the implied right to protect the treaty fishing is different. The protection of undefined roaming rights surely does not support damages – for with multiple fishing locations it would be impossible to determine the numbers of Indians who are derived of fishing or indeed the number of fish that might be reliably calculated as being lost to treaty beneficiaries. **No such inadequacy of damage calculations is present where there exists only one drainage and where there exists only one geographic location where Treaty fishing can be exercised.**

The decision in *Skokomish Tribe* properly acknowledged that under the Court's precedent, in the setting of hundreds of off reservation "usual and accustomed fishing stations", only equitable relief was contemplated to protect the treaty fishing rights secured for the Tribes and their members. The Ninth Circuit found no implied right to a damage remedy as against third parties:

> The Supreme Court has held that the Treaty of Point No Point and similar treaties are "self-enforcing" and thus do not require implementing legislation to form the basis of a lawsuit. . . . To make this determination, the Court looked at language common to the treaties, which stated that the treaties "shall be obligatory on the contracting parties as soon as [they are] ratified by the President and the Senate of the United States." Id. . . . . However, the City [of Tacoma] and TPU

> [Tacoma Public Utilities] are not contracting parties to the Treaty. *Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party.* Cf. *Alexander v. Sandoval*, 532 US 275 (2001) . . . ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.") *Skokomish Tribe*, at 513 (emphasis supplied).

The Klamath Indians agree with these findings of the Ninth Circuit. The Ninth Circuit conclusion is required by the very bargain established in the Northwest treaties – that Indians reserved to this day the right to roam and fish throughout their aboriginal domain. Unlike the Klamaths' federal rights, no one river was required for the Skokomish Indians to secure salmon passage. No one fish passage corridor was to remain open in exchange for the Indians surrendering their aboriginal domain and permitting the white pioneers to settle free of attack. To the contrary, as noted above, the typical Northwest Indians were free to roam as they had since time immemorial. "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." Art. IV, 12 Stat. 933, 934 KER, p. 2.

The Klamaths next show that in the setting of the 1864 on reservation treaty fishing rights established for the Klamath Indians, there does exist in the language and the structure of the treaty "rights creating language "which supports a claim for damages against a non-contracting party.[3] At Klamath, white pioneers, who benefited greatly from the Klamath Indians' renunciation of their aboriginal domain, were necessarily bound to protect salmon passage on the one river which supplied the all important salmon upon which the Klamath treaty was based.

B. The 1864 Klamath Treaty is structured to support a claim for damages – not claims for equitable relief.

PacifiCorp and the lower courts acknowledge that the geographically specific federal fishing right established in the 1864 Klamath treaty established "rights creating language" for which equitable protection exists. That is, no party informs the Court that the Klamath Indians bargained for and received a

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[3] As the Court has noted in its implied right of action cases, rights creating language which is the foundation for an implied right of action is to be distinguished from a congressional plan where Congress merely prohibits certain activity, finding the latter "states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. *California v. Sierra Club*, 451 US 287, 289 (1980). The Klamath treaty contains a rights creating agreement. No proscription against salmon passage interference was specifically established.

federal treaty right with no implied enforcement. Rather, it is claimed that the Klamaths, having bargained in 1864 for a fundamentally different federal right than the multiple 1855 off reservation fishing treaties, are forever limited to only equitable relief, regardless of the specific federal rights created.[4]

On its face, the Treaty, operating with the force of federal law, separated forever the Indians from their former roaming grounds which were located south on the Klamath River into California, restricted them to upstream on Reservation treaty fishing only, and limited their practical ability to protect their treaty rights utilizing equitable remedies. The Treaty on its face and as expressly understood by all parties, provided the following bargain. In exchange for immediately moving on a permanent basis to a confined Reservation, the Klamaths were "secured" exclusive fishing in that small portion of their original domain identified in the 1864 treaty. Essential to "securing" for the Indians their traditional salmon fishing, the United States and newly arriving

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[4] This conclusion is at odds with the Court's longstanding treatment of implied rights and damages: " . . . it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provide an adequate remedy, and if not whether equitable relief would be appropriate. . . . Moreover, in this case the equitable remedies. . . . are clearly inadequate. . . . prospective relief accords her no remedy at all". *Franklin v. Gwinnett County Public Schools*, 503 US at 76.

pioneers assumed the obligation of protecting salmon passage in the only drainage passing into the Reservation – the Klamath River.

> The tribes of Indians aforesaid cede to the United States[and its pioneers] *all their right, title, and claim to all the country claimed by them*, the same being determined by following boundaries, to wit . . . thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of . . .
>
> That the following described tract, *within the country ceded by this treaty*, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians[and] held and regarded as an Indian reservation, . . .
>
> And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, *they will remove to said reservation and remain thereon*,. . . .; *and the exclusive right of taking fish in the streams and lakes, included in said reservation,* and of gathering edible roots, seeds and berries within its limits, *is hereby secured* to the Indians aforesaid. Art. I, 16 Stat. 708; KER, p. 32 (emphasis supplied).

The Indians, the United States and the pioneers all knew the southern boundary of the ceded lands – the *ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose* – embraced large portions of the Klamath River south of the smaller reservation located on the northern portion of the lands described in the treaty as "the country claimed by them." While this geographic bargain may not have been fully understood by pioneers located all the way to the mouth of the Klamath River in California, it was surely understood by then present and future pioneers in southern Oregon and northern California where Copco No. 1 was constructed **within the area ceded.**

The federal plan to have the Klamath Indians – unlike other Northwest Indians – give up their aboriginal roaming and fishing practices on condition that they retain anadromous and non anadromous fishing at the headwaters of the Klamath River followed directly from the unusually hostile pretreaty conflicts between Indians and settlers.

> [t]he advantage of a state of peace over a state of harassing war would be of vast advantage to the pioneers who are endeavoring to develop that country, and will advance the interest of both the settlers and the government many times the amount of the appropriation. Superintendent of Indian Affairs,

> March 5, 1864. Klamaths' Opening Brief, Addendum, p. 6.
>
> If a law could be enacted requiring the Indians to remain upon the reservation and providing for their punishment (by withholding annuities or otherwise) if they absent themselves without the consent of the agent and making it an offence for a white person to entice an Indian to leave, or to conceal or harbor him. . . ., its effect would be most salutary. . . . Superintendent of Indian Affairs, Sept. 26, 1864. *Id.* at p. 8.

Once understood, the rights and responsibilities imposed on the Klamaths and the pioneers preserved treaty fishing in exchange for removing to a reservation at the headwaters of the Klamath drainage. The "advantage" secured by pioneers of ridding their lands of hostile Klamaths was balanced by the "advantage" provided the Klamaths to have their Klamath River anadromous fishing corridor preserved. The Court in *Klamath Tribes v. Oregon Department of Fish*, 473 US 753, 761 (1984) cited to a stipulation in that litigation which confirmed that 1864 Treaty fishing had been "crucial to their survival during the years 1864, 1900 and 1906." In addition the record before the Court here – relied upon by both parties – shows a pre-treaty white explorer writing on May 6, 1846 upon arriving at Klamath Lake; "This is a great fishing station for the Indians. . . . Up this river the salmon crowd in great numbers to the lake, which is more than four thousand feet above the sea." Then post treaty, the

Klamath Falls Republican in 1901 reported: "Enormous droves of fish can be seen in the rivers and creeks throughout the county. Mullets, rainbow trout and salmon – splendid fish giants of their size and apparently anxious to be caught. This phenomenon will last a month, and until their egg-laying camp meeting is over with." Klamaths Opening Brief, Addendum, p. 3A and p. 18.

Moreover, the Ninth Circuit over thirty years ago confirmed that in the Klamaths' Treaty "the Government and the Tribe intended to reserve a quantity of water flowing through the Reservation. . . . for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands." *United States v. Adair,* 723 F.2d 1394, 1410 (9th Cir. 1983), *cert. denied*, 467 US 1252 (1984). The undisputed historic record before the Court therefore confirms that the heart of the 1864 Treaty was the commitment by the United States on its behalf and on behalf of its citizens that the Klamaths would retain the right to fish for salmon on their reduced Reservation.

Neither the Court of Appeals nor the District Court felt free to explore the rights and responsibilities placed in the 1864 Treaty, given the *en banc* decision in *Skokomish Tribe*. Because this Court is not restrained by the Ninth Circuit analysis and has had a longer and more in depth history in dealing with the legal issues raised in the Klamaths' damages action, the Klamaths request this Court to consider their claims on the merits.

C. The Klamaths' ongoing right to have third parties preserve their ceded area's only salmon passage corridor – secured by the boundaries set forth in the treaty, the common knowledge of anadromous fish passage and the on reservation fishing limitation imposed by the treaty – was explicitly acknowledged twice by PacifiCorp's dam building predecessor.

PacifiCorp agrees that the 1864 Treaty secures a different treaty fishing right than those reserved by all other major Northwest treaties. But they informed the lower courts that the Klamaths may protect their acknowledged federal right through injunctive relief against non treaty signatories and damages only against the United States, when Congress so consents.

PacifiCorp is falsely riding the injunctive relief precedent which arose solely out of off reservation fishing disputes involving state regulation or land access to the omniscient fishing locations. Their effort to contend that the past recognition of equitable remedies operates to foreclose damages at law flies in the face of the Court's most recent implied right of action analysis which confirm a right to damages when a protected class is found to have been subjected to "less favorable treatment" through "deliberate indifference." *Jackson v. Birmingham Bd. of Ed.*, 544 US 167, 174 (2005).

Second, PacifiCorp's claim that only equitable relief is available is, of course, 180 degrees different

what its predecessor told the Indians twice, once in 1916 and then again in 1917. Thus in 1916, PacifiCorp's predecessor told the United States as it was constructing Copco No. 1 in the bed of the Klamath River, that the dam being constructed would preserve the passage of salmon to the upstream Klamath Reservation;

> We note that complaints have reached your office through the Klamath Indian Reservation that the run of salmon in the Klamath River has been interfered with by a dam which our company has under construction upon the Klamath River.
>
> In . . . reply we beg to say that we expect that the said dam will be completed by the end of the present year, 1916. Ample provision has been made in the plans for the dam for a fish ladder which will permit unobstructed passage of fish up the Klamath River.

In August 1918, the Assistant Commissioner of Indian Affairs sought assurances that the Klamaths' treaty rights to salmon would in fact be honored.

> This will refer further to the Copco dam being constructed on the Klamath River by the California-Oregon Power Company and the desirability of having installed in connection therewith a fishway to permit salmon to reach the upper waters of the river. . . .
>
> *The Indians of the Klamath Reservation have, from time immemorial, depended upon the supply of fish for a large percentage of*

> *their food and it is highly desirable that proper provision be made by the power company for the passage of salmon over its dam.*
>
> The office feels that the shutting off of the salmon run in the Klamath River was a result of the construction of the dam in question, is an imposition on the Indians who depended upon it in the past and would like to have your cooperation in the matter of requiring the company to build a proper fishway as originally contemplated. (emphasis supplied)

PC ADD. pp. 116-117.

Then a year later in 1917, when the very same power company Copco constructed with the United States Bureau of Reclamation, the Link Dam – 60 miles further north – at the foot of the Upper Klamath Lake – the United States required Copco and Copco agreed as an express condition to initiating construction, to pay damages to the Klamath Indians if their second dam inflicted harm on "property or rights", which on its face includes federal treaty protections.

> *The company assumes any and all liability for damage to the property or rights* of any person or corporation or the property or rights of the State of Oregon *or of the Indians due to the operations of said dam by said Company* or to the regulation and control of the levels of said lake by said Company and hereby undertakes to hold the United States harmless from any and all liability for

> damage due to such regulation and control. Par. 7 (emphasis supplied)

KER, p. 38. The entire 1917 agreement was lodged with the Ninth Circuit. The agreement remains in force.[5]

These two commitments by Copco reflect the understanding of the non Indians who benefited by the removal of the Klamaths to their head waters reservation that Klamath on reservation treaty rights – required ongoing fish passage. Notwithstanding Copco's multiple acknowledgements of its obligation to protect salmon passage, Copco remained "consciously indifferent" to its destruction of the treaty fishing rights "secured" by the treaty of 1864. Given the central role which salmon played at treaty, it is inconceivable that the Indians would have agreed to

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[5] Copco's second written commitment to make the Klamath Indians' treaty fishing whole confirms the widely understood bargain placed in the 1864 treaty that pioneers as well as the United States were to protect the Klamaths' exclusively on reservation fishing rights. The commitment further shows that the protection recognized post dam damages and not merely pre-dam injunctive relief. Finally, because the United States required the payment of damages, the requirement sets forth an understanding that the treaty had indeed included the rights creating language which the Court requires to find an implied right of action for damages in the face of deliberate and/or consciously indifferent violations. While no claim for loss of salmon is claimed for the construction of this second dam – for the year earlier construction of Copco No. 1 had already blocked treaty protected fish passage – Copco's second representation to the Klamaths is nevertheless further indication of the presence of an implied right of action for damages.

stay on their diminished reservation in the absence of assurances of continued fish passage. Accordingly, the rights establishing provisions in the Treaty and the structure of the federal bargain with the Klamaths give rise to a claim for damages. As this Court has directed, such a conclusion follows from an examination of what Congress would had inserted, had a remedy "been included in an express provision in the statute." *Gerber v. Lago Vista Independent School District*, 524 US 274, 285 (1998).

D. Neither the passage of time nor the changed circumstances of the Klamath Reservation operate to sidetrack the Klamaths' request for Court review.

If the Court were to determine that the Klamaths' right of remedy request deserves judicial review, a second issue requires resolution. Is such a right of action for damages barred by either the application of State statute of limitations or laches? PacifiCorp relies upon *South Carolina v. Catawba Indian Tribe*, 476 US 498 (1986) for the proposition that when a Tribe – like the Klamath Tribe – is terminated, 25 USC 564 *et seq.*, state statute limitations are triggered to bar this claim. But of course, the Court in *Catawba Indian Tribe*, 476 US at 509, n. 20 (1986) expressly distinguished its finding in that case from the preservation of hunting and fishing rights secured by treaty associated with another terminated tribe, the Menominee Tribe. *Menominee Tribe v. United States*, 391 US 404 (1968).

And subsequently in cases not challenged by PacifiCorp, the Ninth Circuit applied the treaty analysis and a separate Congressional protection for treaty rights applicable to the Wisconsin Menominee and the Oregon Klamaths, but not the South Carolina Catawbas, 18 USC 1162, to carve out from termination Klamath Treaty fishing and hunting rights. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 US 1019 (1974) and *Kimball v. Callahan II*, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 US 826 (1979). Accordingly, there exists considerable doubt that the Court would apply state statute of limitations to a federal common law claim focusing on the injury to expressly protected treaty fishing rights.

Apart from the *Catawba Tribe* and *Menominee Tribe* analysis, is the application of the Court's retroactivity precedent as it relates to the possible application of state statutes of limitations to the Klamaths' damage claim. *Landgraf v. USI Film Products*, 511 US 244, 265 (1994) directs the analysis to the 1986 Klamath Restoration Act, 25 USC 566 *et seq.* where Congress provided that any provision of the 1954 Klamath Termination Act, 25 USC 564 *et seq.* "shall be inapplicable to the Tribe and the members of the Tribe after the date of the enactment of this Act." 25 USC 566(B). Accordingly if the Klamath Termination Act were to be read – as urged by PacifiCorp – as identical to the Catawba Termination Act with the result that state statutes of limitations would apply to eliminate the Klamath's damage claims here,

Congress directive in 566(B), enacted in 1986 would change that outcome.

Under *Landgraf,* the directive in the 1986 restoration act that any provision in the termination act "shall be inapplicable" to the Tribe and its members after the 1986 enactment date constitutes what the Court described as language of Congress "which expressly preserves the statute's proper reach." 511 US at 280.[6] Under this analysis then, the Klamaths' 2004 damage action would be free of the bar of state statutes of limitations. The Klamaths' common law nuisance claim would be pursued under federal common law principles which impose no statute of limitations. *County of Oneida v. Oneida Indian Nation,* 470 US 226, 240 (1985).

In like fashion, the Court's recent reliance on laches in *City of Sherrill v. Oneida Indian Nation of NY,* 544 US 197, 217-219 (2005) is not applicable here. Noting that the laches defense is "not a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced – an inequity founded upon some change in the condition or relations of the property or the parties", the Court would not permit a belated assertion of a "right to present and future sovereign control over territory. . . , finding that longstanding observances and settled expectations are prime considerations." 511

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[6] This analysis was adopted by the Federal District Court below. Appendix C. App. 16-17.

US at 218. Here, in contrast, no change in the relations of property or the parties can seriously be alleged or proven. Copco and now PacifiCorp continues to block salmon passage and continues to make millions of dollars through hydropower generation. Accordingly while the passage of time does increase the amount of the Klamaths' damages, those damages are modest indeed when compared to the profits enjoyed by PacifiCorp generating hydropower each year since 1917.

Finally, the decision to review this appeal should not be influenced by the multiple so-called defenses which PacifiCorp has offered below. Thus licensing of Copco No. 1 under the Federal Power Act, 16 USC 791a *et seq.* in the 1950's plays no role in this damage claim which is premised on a 1917 destruction of the Klamaths' salmon fishery. Similarly, the fact that congressional termination in the 1950's reduced the concentration of Klamath fishermen and that transfer of much of the Klamaths' 1864 reduced reservation to the United States Forest Service resulted in Klamath treaty fishing being undertaken side by side with non Indian fishing regulated by the State of Oregon both relate, if at all, to the damage calculation. Such change in circumstances do not and can not eliminate an otherwise identified implied right of action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL H. ISRAEL
1315 Bear Mountain Drive
Boulder, Colo 80305
303-246-9027

May 27, 2008

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KLAMATH TRIBES OF OREGON; JOSEPH HOBBS; REPORT ANDERSON; JOSEPH KIRK; ORIN KIRK; LEONARD NORRIS, JR.; PHILLIP [sic] TUPPER; ROBERT BOJORCAS; KLAMATH CLAIMS COMMITTEE; CATHERINE WEISER-GONZALEZ; MILLER ANDERSON, Plaintiffs-Appellants, v. PACIFICORP, Defendant-Appellee.	No. 05-36010 D.C. No. CV-04-00644-AA MEMORANDUM* (Filed Feb. 28, 2008)

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted February 7, 2008
Portland Oregon

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: RYMER, T.G. NELSON, and PAEZ, Circuit Judges.

The Klamath Tribes of Oregon, the Klamath Claims Committee, and individual members of the Klamath Tribe (collectively the "Tribe") appeal from the district court's grant of summary judgment in favor of PacificCorp. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

The Tribe's cause of action for damages is foreclosed by our prior decision in *Skokomish Indian Tribe v. United States,* 410 F.3d 506 (9th Cir. 2005) (en banc).

AFFIRMED.

PAEZ, Circuit Judge, concurring:

For the reasons explained by Judge Berzon in her dissent on the treaty-based damages claim at issue in *Skokomish Indian Tribe v. United States,* 410 F.3d 506, 522 (9th Cir. 2005) (en banc), I continue to believe that case was wrongly decided. The majority opinion, however, is the law of the circuit, and I am obligated to follow it.

In light of the majority's reasoning in *Skokomish,* I am not persuaded by Appellants' argument that, because the treaty right at issue here is different, *Skokomish* should not control the outcome of this case. There, the Skokomish Indian Tribe sought to maintain an action for damages against the City of

Tacoma and Tacoma Public Utilities for a violation of a provision in the Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933, that secured to the Tribe "the right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States." *Id.,* art. 4. The *Skokomish* majority affirmed dismissal of the Tribe's claim, holding that it could find "no basis for implying the right of action for damages that the Tribe seeks to assert." 410 F.3d at 514. In so holding, the majority emphasized that the City and Tacoma Public Utilities were not contracting parties to the Treaty, and that there was not "anything in the language of the Treaty that would support a claim for damages against a non-contracting party." *Id.* at 513.

Here, Appellants seek to maintain an action for damages against PacificCorp for violating a provision in the Treaty with the Klamath, etc., 1864, 16 Stat. 707 (Klamath Treaty), that secured to the Klamath Tribe "the exclusive right of taking fish in the streams and lakes, included in said reservation. . . ." *Id.,* art 1. Although this Treaty provision secures to the Klamath exclusive on-reservation fishing rights, it is not so qualitatively different from the off-reservation fishing rights secured to the Skokomish Tribe that we are free to depart from the majority's holding in *Skokomish.* Further, as in *Skokomish,* there is no language in the Klamath Treaty that would support a claim for damages against a non-contracting private party. I therefore conclude that

Appellants' claim for damages is foreclosed by *Skokomish*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH TRIBES OF OREGON, MILLER ANDERSON, JOSEPH HOBBS, CATHERINE WEISER-GONZALEZ, ROBERT ANDERSON, JOSEPH KIRK, ORIN KIRK, LEONARD NORRIS, JR., PHILIP TUPPER, ROBERT BOJORCAS, and KLAMATH CLAIMS COMMITTEE, Plaintiffs, v. PACIFICORP, an Oregon corporation, Defendant.	Civ. No. 04-644-CO ORDER

AIKEN, Judge:

Plaintiffs filed suit alleging trespass and violations of their fishing rights under the Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, Oct. 14, 1864 (Treaty of 1864), 16 Stat. 707. Defendant moved for summary judgment, arguing that the termination of the Klamath Tribe rendered plaintiffs' claims subject to the Oregon statutes of limitations,

and that the limitations period regarding plaintiffs' treaty and trespass claims against defendant or its predecessors expired prior to the restoration of the Tribe's status in 1986.

United States Magistrate Judge Cooney issued his Findings and Recommendation and recommended that defendant's motion for summary judgment be granted. Upon *de novo* review, I agreed that defendant's motion for summary judgment should be granted, finding that the Ninth Circuit's opinion in *Skokomish Indian Tribe v. United States,* 410 F.3d 506, 510, 514 (9th Cir. 2005) (en banc) foreclosed a suit for damages based on the interference with treaty fishing rights brought against third parties. *See* Opinion and Order dated July 13, 2005.

Plaintiffs now move to amend the judgment of the court, arguing that the Treaty of 1864 is distinguishable from the Treaty of Point No Point involved in *Skokomish,* and that the holding of *Skokomish* is not applicable here. Given that the court granted defendant's motion for summary judgment on grounds not raised by the parties, I will consider plaintiffs' motion.

Nevertheless, I do not find plaintiffs' argument persuasive. Plaintiffs argue that a cause of action against third parties for damages is implied under the Treaty of 1865, because its language protects fish passage to former reservation lands as opposed to the right to take fish in common reserved under the Treaty of Point No. Point. *Compare* Treaty of 1864, Article I

(reserving to the Klamath Tribe "the exclusive right of taking fish in the streams and lakes, included in [the] reservation") *with* 1855 Treaty of Point No Point (reserving to the Skokomish Tribe "[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United Staten").

As explained in the court's previous order, I do not find that this distinction renders the holding in *Skokomish Indian Tribe* inapplicable to plaintiffs' claim for damages arising from defendant's alleged interference with plaintiffs' treaty right to take fish, Plaintiffs identify no language in the Treaty of 1864 that supports such a cause of action for damages against a third party.

Accordingly, plaintiffs' Motion to Amend Judgement (doc. 76) is DENIED.

IT IS SO ORDERED.

Dated this 20 day of September, 2005.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KLAMATH TRIBES OF OREGON, MILLER ANDERSON, JOSEPH HOBBS, CATHERINE WEISER-GONZALEZ, ROBERT ANDERSON, JOSEPH KIRK, ORIN KIRK, LEONARD NORRIS, JR., PHILIP TUPPER, ROBERT BOJORCAS, and KLAMATH CLAIMS COMMITTEE,

Plaintiffs,

v.

PACIFICORP, an Oregon corporation,

Defendant.

Civ. No. 04-644-CO

OPINION AND ORDER

AIKEN, Judge:

Plaintiffs filed suit alleging trespass and violations of their fishing rights under the Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, Oct. 14, 1864 (Treaty of 1864), 16 Stat. 707. *See United States v. Adair,* 723 F.2d 1394, 1398 (9th Cir. 1983). On February 10, 2005, defendant moved for

summary judgment, arguing that the termination of the Klamath Tribe, effective 1961, rendered any claim asserted by plaintiffs subject to the Oregon statutes of limitations, and that the limitations period regarding plaintiffs' treaty and trespass claims against defendant or its predecessors expired prior to the restoration of the Tribe's status in 1986.

On April 14, 2005, United States Magistrate Judge Cooney issued his Findings and Recommendation and recommended that defendants' motion for summary judgment be granted. Magistrate Judge Cooney found that the Klamath Termination Act "presents clear congressional intent to redefine the relationship between the Tribe [and the federal government] [and to] remove the special protections previously afforded the Tribe, and this requires the application of the state statute of limitations to the Tribe's claims." Findings and Recommendation, p. 8. Thus, Magistrate Judge Cooney found plaintiffs' claims barred as untimely. The matter is now before me. *See* 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's findings. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Plaintiffs filed timely objections to the Findings and Recommendation. I have, therefore, given *de novo* review of Magistrate Judge

Cooney's rulings. I agree that defendant's motion for summary judgment should be granted, although for different reasons than those asserted by defendant.

Plaintiffs do not contest the factual background in the Findings and Recommendation, and I will not repeat it here. Generally, plaintiffs seek damages resulting from the construction and continued operation of dams owned by defendant on the Klamath River. Plaintiffs allege that since 1916, the dams have blocked passage for fish and reduced river flows and water quality, and that the resulting depletion of steelhead and salmon runs interferes with their reserved treaty right to take fish.

Plaintiffs assert two claims for relief against defendant in their First Amended Complaint: one alleging that defendant has "violated the federal treaty rights of the plaintiffs to enjoy Treaty fishing, year to year, subject to varying River flows and appropriate conservation management"; the other alleging that defendant's actions "unlawfully trespass upon and interfere with federal protected property rights of the plaintiffs and their predecessors." First Amended Complaint for Damages, p. 8. Neither party nor Magistrate Judge Cooney distinguished these claims.

While plaintiffs' treaty rights claim is well-established, plaintiffs "federal common law" claim for trespass is questionable based on the facts alleged. Generally, liability for trespass involve "invasions of the interest in the exclusive possession and physical

condition of land." Restatement (Second) of Torts, div. 1, chap. 7, top. 1 (1965) (scope note); *see also id.* § 158. Indeed, relevant cases recognizing federal causes of action sounding in trespass were intended to protect the right of Indian tribes to occupy Indian lands. *See United States v. Pend Oreille Pub. Utility Dist. No. 1,* 28 F.3d 1544, 1549, n.8 ("The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages.") (citing cases).

Here, plaintiffs do not allege that the dams owned by defendant invade or interfere with the use and enjoyment of land possessed by the Tribe. To the extent that plaintiffs' treaty fishing rights support a property interest in former reservations lands, plaintiffs do not allege an invasion of such land so as to interfere with their ability to access these lands and exercise their right to take fish. Rather, plaintiffs allege violations of and interference with their treaty fishing rights caused by the dams' impact on river flows, water quality, and steelhead and salmon runs. *See* First Amended Complaint for Damages, pp. 3-4.

In their objections to the Findings and Recommendation, plaintiffs invoke federal takings law to support their argument that they may assert "federal trespass claims" against a third party for unlawful interference with or destruction of their treaty fishing rights. While plaintiffs' treaty fishing rights are protected property rights subject to compensation for an unlawful taking by the federal government, *see*

Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1513 (W.D. Wash. 1988), the existence of a property interest in treaty fishing rights does not necessarily support a federal common law claim of trespass against a private party where no invasion or interference with the possession, use, or occupancy of land is alleged.

Even if plaintiffs' second claim for relief could be construed as asserting trespass to chattel based on the alleged harm to fish caused by defendant's actions, the scope of plaintiffs' reserved right to take fish is defined by the Treaty of 1864. Restatement (Second) of Torts § 220 (1965) ("One who commits a trespass to a chattel is subject to liability to another who is entitled to the future possession of the chattel for harm thereby caused to such other's interest in the chattel."). Therefore, I construe plaintiffs' second claim for relief as one for interference with their fishing rights reserved by the Treaty of 1864, which is nothing more than the violation of treaty rights alleged in plaintiffs' first claim for relief. The question remains whether plaintiffs' claim seeking damages for violations of their treaty rights is barred by the statute of limitations.

Article I of the Treaty of 1864 reserves to the Klamath Tribe "the exclusive right of taking fish in the streams and lakes, included in [the] reservation." *Kimball v. Callahan,* 590 F.2d 768, 770 (9th Cir. 1979). In 1954, Congress passed the Klamath Termination Act, effective as of 1961. 25 U.S.C. § 564, *et seq.*

> The purpose of the Act was to terminate federal supervision over the trust and restricted property of the Klamath Tribe of Indians, to dispose of federally owned property acquired or withdrawn for the administration of the Indians affairs, and to terminate federal services furnished the Indians because of their status as Indians.

Kimball, 590 F.2d at 770. Further, the Act provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U.S.C. § 564q. The Act, however, expressly stated that "nothing" in the Act "shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." *Id.* § 564m(b). Magistrate Judge Cooney nevertheless found that the language of the Termination Act unambiguously subjected all claims by plaintiffs to the relevant statute of limitations as of 1961, and that the statute of limitations relevant to plaintiffs' treaty claims ran prior to the Klamath Tribe's restoration in 1986.

Plaintiffs object to the Findings and Recommendation, arguing that the Klamath Termination Act did not expressly subject treaty claims to Oregon statutes of limitations, and that any construction of the Klamath Termination Act should be construed in their favor to preclude application of statutes of limitations to treaty rights claims. Plaintiffs rely on *County of Oneida v. Oneida Indian Nation,* 470 U.S.

226 (1985), where the Supreme Court reaffirmed the right of Indian tribes to bring an action under federal common law to enforce or vindicate their "aboriginal land rights." *Id.* at 235. The Oneida Nation had sued to recover damages "representing the fair rental value" of land conveyed to the State of New York in violation of the Trade and Intercourse Act of 1793 (the Non-Intercourse Act) and presently owned by the County. *Id.* at 229. On appeal to the Supreme Court, the County argued that the Oneida Nation's claim for unlawful possession was barred by the relevant state statute of limitations.

The Court noted that "[i]n the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, *provided that the application of the state statute would not be inconsistent with underlying federal policies*." *Id.* at 240 (emphasis added). The Court held that Oneida Nation's federal common law action was not subject to the applicable state statute of limitations, because "the borrowing of a state limitations period in these cases would be inconsistent with federal policy. Indeed on a number of occasions Congress has made this clear with respect to Indian land claims." *Id.* at 241 (emphasis omitted).

Plaintiffs argue that applying the relevant Oregon statute of limitations to their treaty rights is inconsistent with federal law protecting treaty fishing rights from state law interference. *See Menominee Tribe of Indians v. United States,* 391 U.S.

404, 411-12 (1968); *Adair,* 723 F.2d at 1411; *Kimball,* 590 F.2d at 776-77; *Kimball v. Callahan,* 493 F.2d 564, 568-69 (9th Cir. 1974). Plaintiffs emphasize that the Klamath Termination Act explicitly provides that nothing in the Act shall be construed so as to abrogate fishing rights or privileges reserved under the Treaty of 1864. 25 U.S.C. § 564m(b). Thus, plaintiffs argue that application of statutes of limitations to curtail enforcement of their treaty rights constitutes a "back-handed abrogation" of those rights in violation of federal policy.

Defendant, in turn, argues that application of the statutes of limitations does not abrogate plaintiffs' fishing rights but merely requires plaintiffs to assert such rights in a timely manner. Defendant relies on the Supreme Court decision in *South Carolina v. Catawba Indian Tribe, Inc.,* 476 U.S. 498, 500 (1986), where the Court held that the relevant state limitations period applied to the Catawba Tribe's claim for possession of land held by the Tribe prior to the passage of the Non-Intercourse Act. Distinguishing *County of Oneida,* the Court reasoned that the Catawba Act's termination of federal services and protections "represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to 'all other persons or citizens.'" *Catawba Indian Tribe,* 476 U.S. at 508. The Court concluded that "the explicit redefinition of the federal

relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claims." *Id.* at 510-11.

Although *Catawba Indian Tribe* did not involve rights reserved pursuant to treaty, defendant argues that its holding applies with equal force to plaintiffs' claims, because "[t]he Klamath Tribe's federal common law claim is an aboriginal right reserved, not created, by the Treaty of 1864." Defendant's Amended Response to the Klamath Tribe's Objections, p. 6. Even if Oregon statutes of limitations applied to claims of the Klamath Tribe as of its termination in 1961, I find that the intervening congressional act of restoration distinguishes this case from *Catawba Indian Tribe.*

In 1986, tribal status was restored to the Klamath through the Klamath Indian Tribe Restoration Act. 25 U.S.C. § 566, Pub. L. 99-398 (August 27, 1986, 100 Stat. 849). It explicitly provides:

> All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement or statute, or any other Federal authority, which may have been diminished or lost under the [Klamath Termination Act] approved August 13, 1954 (25 U.S.C. 564 et seq.) *are restored, and the provisions of such Act, to the extent that they are inconsistent with this Act, shall be inapplicable to the tribe and to members of*

> *the tribe after the date of the enactment of this Act.*

Id. § 566(b). In contrast to *Catawba Indian Tribe,* the Klamath Indian Tribe Restoration Act not only restores federal services and protections to the Klamath Tribe, it explicitly "restored" all treaty rights that were "diminished or lost" under the Klamath Termination Act. Given that "'canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians,'" the court must construe the Restoration Act "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985) (quoting *County of Oneida,* 470 U.S. at 247). If construed in favor of the Klamath Tribe, the Restoration Act arguably restores the right of the Tribe to enforce its treaty fishing rights if extinguished by virtue of Oregon statutes of limitations rendered applicable under the Klamath Termination Act.

Nonetheless, a recent Ninth Circuit opinion forecloses plaintiffs' right to file suit for damages based on the interference with their treaty fishing rights. In *Skokomish Indian Tribe v. United States,* 410 F.3d 506 (9th Cir. 2005) (en banc), the Skokomish Tribe brought suit against the United States, the City of Tacoma, and the Tacoma Public Utilities (TPU) seeking damages resulting from the impacts of a hydroelectric project on tribal lands and fisheries. *Id.* at 509-10. The Skokomish Tribe alleged that actions

of the City and the TPU violated the Tribe's fishing rights under the Treaty of Point No Point, which reserved to the Skokomish Tribe "[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States." *Id.* at 510.

The Ninth Circuit, sitting *en banc,* held that although a treaty may "provide rights of action for equitable relief against non-contracting parties," the Treaty of Point No Point did not provide a cause of action for *damages* against a non-party to a treaty based on alleged treaty violations. *Id.* at 512. The court noted that although the Treaty of Point No Point and similar treaties are generally "'self-enforcing' and thus do not require implementing legislation to form the basis of a lawsuit," the treaties by their terms "shall be obligatory on the *contracting parties*." *Id.* at 513. "However the City and TPU are not contracting parties to the Treaty. Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party." *Id.*

The Ninth Circuit distinguished several cases suggesting a contrary result, including *County of Oneida,* where the Oneida Nation was allowed to seek damages for the unlawful possession of its land. *Skokomish Indian Tribe,* 410 F.3d 513-14. The court explained that the decision in *County of Oneida* "was not based on any treaty. Rather, it was based on well-established federal common law principles regarding aboriginal possessory rights in land. By contrast, the

Tribe in our case is seeking to collect damages for violation of fishing rights reserved to it by treaty." *Skokomish Indian Tribe*, 410 F.3d at 514. Thus, "there is no basis for implying the right of action for damages that the Tribe seeks to assert." *Id.* at 514.[1]

Here, plaintiffs do not seek prospective relief regarding the alleged interference with their treaty fishing rights. Rather, they seek damages of over $1 billion for violations of those rights. Further, the Treaty of 1864, like the Treaty of Point No Point, states that the Treaty "shall bind the contracting parties whenever the same is ratified by the Senate and the President of the United States," *see* Declaration of David A. Bledsoe, Ex. 3, p. 5, and neither Pacificorp nor its predecessors were contracting parties to the Treaty of 1864.

Finally, the reservation of fishing rights under the Treaty of 1864 does not materially differ from that of the Treaty of Point No Point. Both treaties reserve the right to take fish, albeit the Klamath's right is within (former) reservation lands while the Skokomish's right is in common with non-Indians at their "usual and accustomed grounds and stations." I do not find that this distinction renders the holding in *Skokomish Indian Tribe* inapplicable to plaintiffs'

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[1] Regardless of the soundness of these distinctions, *see* 410 F.3d at 523-27 (Berzon, J., dissenting), *Skokomish Indian Tribe* is Ninth Circuit precedent that this court is obligated to follow.

claim for damages arising from interference with plaintiffs' treaty right to take fish.

Accordingly, Magistrate Judge Cooney's Recommendation is ADOPTED, although I decline to adopt the findings supporting the recommendation. Defendant's Motion for Summary Judgment (doc. 36) is GRANTED, and plaintiffs' motion for partial summary judgment (doc. 57) is DENIED as moot.

IT IS SO ORDERED.

Dated this 13 day of July, 2005.

/s/ Ann Aiken
Ann Aiken
United States District Judge